IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

JOHN EARL BUSH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT AND APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION

> We cannot possibly determine whether death is an unusual punishment when compared with other death penalty cases, as required by the Florida Constitution, because we have almost nothing to compare. Art. I, [sec.] 17, Fla. Const.

Tillman v. State, 591, So. 2d 167, 169 (Fla. 1991).

> When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. Downs v. State, 572 so. 2d 895 (Fla. 1990), cert. denied, 502 U.S. 829, 112 S. Ct. 101, 116 L.Ed.2d 72 (1991); Slater v. State 316 So. 2d 539 (Fla. 1975). Thus, **an equally or more culpable codefendant's sentence is relevant to a proportionality analysis**. Cardona v. State, 641 So. 2d 361 (Fla. 1994), cert. denied, --- U.S. ---, 115 S. Ct. 1122, 120 L.Ed.2d 1085 (1995).

Larzelere v. State, 676 So. 2d 394, 406-07 (Fla. 1996) (emphasis added).

Here, codefendants John Earl Bush, Alphonso Cave and J.B. Parker were convicted of first-degree murder and sentenced to death. However, Mr. Cave's sentence was later vacated and he is awaiting resentencing. The State has always contended that Alphonso Cave pulled the trigger and fired the fatal shot. In fact, during Mr. Cave's first resentencing in 1993,[1] the State presented evidence and argued that Mr. Cave was the leader and actual shooter. In his closing argument in Cave's resentencing, the prosecutor specifically argued:

> The defendant [Alphonso Cave] came back armed with a pistol, not his co-defendants, one pistol and this defendant had it in his hand, not the co-defendants, he did. Who's the leader of the gang? The man with the pistol in his hand is the leader of the gang. Thus, [Mr. Cave] knew when he entered the store the second time at 2:45 a.m. on April the 27th, 1982, that he would

[1]Mr. Cave received a death sentence at that resentencing, but this Court reversed the sentence and ordered a second resentencing, which is scheduled to occur in November, 1996.

> be killing later that morning because he had already decided not to conceal his identity or the identity of his co-robbers or kidnappers, he knew he would leave no witnesses alive and he knew that he would kill.

(Transcript of 1993 Cave resentencing). At this point, however, Mr. Bush is facing execution and Mr. Cave has no sentence in place.

Thus, in this appeal, this Court is presented with a novel situation. Mr. Cave may receive a life sentence at his resentencing. Should that occur, Mr. Bush would then have the right to challenge the proportionality of his death sentence based upon the life sentence given to the more culpable Mr. Cave. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). However, Mr. Bush is scheduled to be executed in two days and therefore may be executed with no valid review of the proportionality of his death sentence having been conducted. Under these circumstances, a stay of execution is appropriate.

Further, on October 13, 1994, this Court's opinion declaring the statutory language regarding the cold, calculated and premeditated aggravating factor unconstitutionally vague became final. Jackson v. State, 648 So. 2d 85 (Fla. 1994). Mr. Bush's jury was told to rely on this unconstitutionally vague language despite a specific objection. Mr. Bush's judge relied on this unconstitutionally vague language. Mr. Bush challenged this aggravator on direct appeal as unconstitutional as applied. Under Jackson, Mr. Bush's death sentence must be declared invalid. Jackson, 648 So. 2d at 94 (Justice Overton noted that the majority opinion rendered "every death case in which the standard jury instruction on the cold, calculated and premeditated aggravating factor was given subject to attack in a motion under Rule 3.850"). Again, a stay of execution is appropriate.

REQUEST FOR ORAL ARGUMENT

An oral argument has been scheduled for 9:00 a.m. on October 15, 1996.

STATEMENT OF THE CASE AND OF THE FACTS

John Earl Bush is scheduled to die in Florida's electric chair on October 17, 1996, at 7:00 a.m.

Mr. Bush was charged with first-degree murder, armed robbery, kidnapping, alleged to have occurred on April 27, 1982 in Martin County. Mr. Bush's three codefendants, Alphonso Cave, J.B. Parker, and Terry Wayne Johnson, were each similarly charged with first degree murder, kidnapping, and armed robbery. Mr. Bush entered a plea of not guilty to all charges.

Mr. Bush's trial was conducted November 15, 16, 17, 18 and 19, 1982. After a penalty phase hearing on November 22, 1982, the jury recommended death by a vote of 7-5. Mr. Bush was convicted on all counts on November 22, 1982, and Judge Trowbridge imposed a sentence of death as to Count I; and Life Imprisonment as to Counts II and III on that same day.

Mr. Bush's codefendant, Alphonso Cave, was tried December 7-9, 1982. After he was convicted, his penalty phase proceeding was conducted on December 10, 1982. Following a death recommendation, a death sentence was imposed that same day.

Mr. Bush's other codefendant, J.B. Parker, was tried on January 3-7, 1983. After he was convicted the penalty phase hearing was conducted January 10-11, 1983. On January 11, 1983, the trial judge followed the jury's death recommendation and imposed a death sentence.

Mr. Bush's third codefendant, Terry Wayne Johnson, was tried on April 4-8, 1983. Following his conviction on April 8, 1982, the trial court entered a life sentence without proceeding to penalty phase based upon Enmund v. Florida, 102 S. Ct. 3368 (1982).

Mr. Bush appealed his convictions and sentences to this Court. On November 29, 1984, this Court upheld the sentence of death imposed upon Mr. Bush. Rehearing was denied January 31, 1985. Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 106 S.Ct. 1237 (1986). At the time of that appeal, both Mr. Cave and Mr. Parker had death sentences in place which were pending before this Court and subsequently affirmed. Cave v. State, 476 So. 2d 180 (1985); Parker v. State, 476 So. 2d (1985).

On April 21, 1986, Mr. Bush filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and a petition for a writ of habeas corpus in the Florida Supreme Court. This Court affirmed the trial court's denial of Mr. Bush's Rule 3.850 motion and denied his petition for a writ of habeas corpus. Bush v. Wainwright, 505 So.2d 409 (Fla. 1987).

Mr. Bush filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Ft. Myers Division, on February 1, 1988. Judge Carr conducted an evidentiary hearing January 4 - 6, 1989, limited to the claim of ineffective assistance of counsel at sentencing, denied relief in an order of August 7, 1988, and thereafter on November 2, 1989, denied Mr. Bush's motion to alter or amend judgment and for entry of a new judgment filed pursuant to Fed. R. Civ. P. 59.

A Petition for Extraordinary Relief and for a Writ of Habeas Corpus was filed with this Court on September 4, 1990. The Petition was denied on March 28, 1991. Rehearing was denied on June 12, 1991.

Mr. Bush filed his brief with the United States Court of Appeals for the Eleventh Circuit on September 9, 1991. The Eleventh Circuit denied Mr. Bush relief on March 30, 1993. Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993).

Meanwhile, the Eleventh Circuit granted habeas relief and ordered a resentencing in Cave v. Singletary, 971 F. 2d 1513 (11th Cir. 1992). Following reimposition of the death sentence at Mr. Cave's resentencing, this Court vacated the death sentence and remanded for a new penalty phase before a jury. Cave v. State, 660 So. 2d 705 (Fla. Sept. 21, 1995). Mr. Cave is now awaiting a jury resentencing scheduled for November 12, 1996.

On January 28, 1994, a Petition for Executive Clemency for John Earl Bush was submitted by clemency counsel Robert L. Appleget, Jr., who argued that the lack of a final sentence in Alphonso Cave's case warranted clemency consideration. On March 9, 1994, a clemency hearing for John Earl Bush was held before Governor Lawton Chiles and his cabinet. On September 16, 1996, Governor Chiles signed a warrant for the week of October 16-23 scheduling the execution of John Earl Bush by electrocution for 7:00 a.m. on Thursday, October 17, 1996.

On October 11, 1996, Mr. Bush filed a Rule 3.850 motion in the state circuit court. On October 14, 1996, counsel for Mr. Bush filed notice of appeal after Mr. Bush was denied relief at a hearing in circuit court, and this appeal ensued.

ARGUMENT I

MR. BUSH IS ENTITLED TO AN ACCURATE PROPORTIONALITY REVIEW AND FINDING THAT HIS DEATH SENTENCE IS PROPORTIONAL UNDER THE FLORIDA CONSTITUTION.

Mr. Bush must receive a constitutionally valid proportionality review of his death sentence. However, as long as Mr. Cave's sentence is not yet determined, the proportionality review mandated by the Florida Constitution cannot occur.

> We have described the "proportionality review" conducted by this Court in every death case as follows:
>
> > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of circumstances in a case, and to compare it with other capital cases.* It is not a comparison between the number of aggravating and mitigating circumstances.
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> Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)(citation omitted)(emphasis added), *cert. denied.*, --- U.S.---, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). *Accord* Hudson [v. State], 538 So. 2d [829], 831 (Fla. 1989); Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. [footnote omitted]. It clearly is 'unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.

Tillman v. State, 591 So. 2d 167 (Fla. 1991).

Mr. Bush's codefendant Alphonso Cave is awaiting resentencing. There is evidence that Mr. Cave was the more culpable defendant, in that he actually was the triggerman who fired the fatal bullet.

Although the victim was only shot once, the State has consistently maintained that both J.B. Parker and Alphonso Cave were the actual triggerman. At Mr. Parker's only trial and penalty phase, the state argued and presented evidence that Mr. Parker was the actual shooter. Based upon the State's evidence, Mr. Parker's trial court entered fact findings in support of his death sentence that Mr. Parker was the triggerman.

During Mr. Cave's 1993 resentencing, the State presented evidence and argued that Mr. Cave was the actual shooter. The State's witness Michael Bryant testified that he overheard Mr. Cave admit to being the shooter. The State's opening argument included the following statement: "And [Mr. Cave], while the victim was screaming, shot her execution style in the back of the head." Similarly, the State's closing argument asserted:

> The defendant came back armed with a pistol, not his co-defendants, one pistol and this defendant had it in his hand, not the co-defendants, he did. Who's the leader of the gang? The man with the pistol in his hand is the leader of the gang. Thus, [Mr. Cave] knew when he entered the store the second time at 2:45 a.m. on April the 27th, 1982, that he would be killing later that morning because he had already decided not to conceal his identity or the identity of his co-robbers or kidnappers, he knew he would leave no witnesses alive and <u>he knew that he would kill</u>.

(Transcript of 1993 Cave resentencing).

In its sentencing order, Mr. Cave's trial judge was unable to "conclude, beyond and to the exclusion of every reasonable doubt, that the defendant personally shot the victim...although there was evidence that [Mr. Cave] admitted shooting the victim."

However, Mr. Cave's sentencing judge did find that after Mr. Cave personally "cased out" the premises of the convenience store:

> Mr. Cave personally entered the store armed with a loaded handgun and with at least one other co-defendant...[Mr. Cave] personally threatened, assaulted and robbed the clerk at gun point. After forcibly obtaining currency, the defendant, ALPHONSO CAVE, personally forced the victim into the rear seat area of the vehicle, forced her body and her face down into the lap and crotch area of the defendant and confined her thereto at gunpoint. While personally confining and restraining the victim, ALPHONSO CAVE, along with the three other co-defendants transported the victim to a desolate and remote area in Martin County where Frances Julia Slater was murdered.

(1993 Sentencing Order from Alphonso Cave's resentencing). Finally, the trial court concluded that

> at the very least, [Mr. Cave] served as a major participant in each facet of the crimes, was clearly the leader or co-leader of this criminal episode and was clearly the person who possessed and used the loaded handgun throughout the vast majority of this criminal episode.

(1993 Sentencing Order from Alphonso Cave's resentencing).

While there is ample evidence that Mr. Cave was the triggerman, there is no evidence that Mr. Bush was the triggerman. The victim was killed by a single bullet to the head. Although the medical examiner testified that the victim received a stab wound to the stomach, he stated this wound was only "superficial" and did not cause the victim's death. Rather, the medical examiner unequivocally stated a single shot to the head killed the victim. With respect to the cause of the victim's death, this Court has stated, "Medical testimony established that the gunshot--not the stabbing, which was a two-inch shallow wound--killed the victim." Parker v. State, 476 So. 2d 134, 136 (Fla. 1985). The State presented no

evidence at trial or penalty phase indicating that Mr. Bush fired the single shot that killed the victim. Indeed, the trial court's fact findings in support of sentencing expressly stated that Mr. Bush was not the triggerman:

> The only version of the actions that took place that night that we have come from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume, that from the evidence of [the medical examiner], that the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that.

(R. 1364-1365). Moreover, there is no evidence in the files and records of this case indicating that Mr. Bush was the triggerman.

A. IF MR. CAVE RECEIVES A LIFE SENTENCE, MR. BUSH WILL BE ENTITLED TO CHALLENGE HIS DEATH SENTENCE AS DISPROPORTIONATE

Presumably the State will present the evidence that Mr. Cave was the triggerman at Mr. Cave's November 15, 1996 resentencing as it did at the prior sentencing proceeding in 1993. If Mr. Cave receives a life sentence, his life sentence constitutes newly discovered evidence. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). On this point, this Court is clear:

> [W]e hold that in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence.

Id. at 469.

In Scott v. Dugger, this Court resolved the effect of a codefendant's life sentence imposed after this Court affirmed the defendant's death sentence on direct appeal. Scott v. Dugger involved two equally culpable codefendants, Robinson and Scott, who committed

robbery, kidnapping, and first degree murder.[2] On direct appeal, this Court affirmed Scott's conviction and sentence but vacated Robinson's death sentence and remanded for a resentencing. Robinson was resentenced to life. Based upon Robinson's subsequent life sentence, Scott filed a Rule 3.850 motion requesting that his death sentence be vacated as disproportionate, disparate, and invalid. Scott characterized Robinson's death sentence as "newly-discovered evidence." The circuit court summarily denied relief on this claim, finding it "untimely" and "improper" under Rule 3.850. This Court reversed the trial court and held that a codefendant's subsequent life sentence constitutes newly discovered evidence cognizable under Rule 3.850. Because Robinson had received a life sentence, this Court vacated Scott's death sentence and remanded for imposition of a life sentence. Id. at 470.

Mr. Bush's case is almost identical to Scott v. Dugger, but for the fact that Mr. Cave does not have a final sentence in place. Like Scott, this case involves robbery, kidnapping, and murder. Further, Cave's death sentence was vacated by the Eleventh Circuit in 1992, long after Mr. Bush's affirmance on direct appeal. Most notably, Alphonso Cave is at least equally, if not more, culpable than Mr. Bush. Although both men were involved in all aspects of the crime, it was Mr. Cave who was found to be the "ring leader." It was Mr.

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[2]As to Robinson's and Scott's equal culpability for the crime itself, "they were both involved in all aspects of it. They both participated in the robbery of the victim, his kidnapping, his beatings and, although Scott eventually ran the man down with the automobile, it was only after Robinson concocted this method of killing the victim, and, in fact was the first to try, but failed. It is clear that this is not a case where Scott was the triggerman and Robinson a mere unwitting accomplice along for the ride. In fact, 'there is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent'." Scott v. Dugger, 604 So. 2d at 468, quoting trial judge Susan Schaeffer's letter to the governor and other members of the Clemency board regarding the relative culpability of the codefendants.

Cave who personally threatened, assaulted, and robbed the store clerk at gunpoint. It was Mr. Cave who personally forced the victim at gunpoint into the car and confined her during her transport. And, depending upon which case the state happened to be presenting, it was either Alphonso Cave or J.B. Parker who actually shot the victim -- not Mr. Bush. Even viewing the evidence in the light most favorable to the State, the worst conclusion that can be drawn concerning Mr. Bush's relative culpability is that "there is little to separate out the joint conduct of the codefendants which culminated in the death of the decedent." Scott, 604 So. 2d at 468. The facts of this case demonstrate that Alphonso Cave remains more culpable than Mr. Bush.

B. MR. BUSH MAY BE EXECUTED PURSUANT TO A PROPORTIONATELY INVALID SENTENCE

Mr. Bush's case differs in one important respect from Scott v. Dugger. Alphonso Cave is awaiting jury resentencing scheduled for November 12, 1996; thus, he does not have a sentence. It may be argued that Mr. Bush's newly discovered evidence claim based upon Alphonso Cave's life sentence is merely inchoate; but this argument should be rejected for two reasons. First and foremost, it is fundamentally unfair for the State to extinguish Mr. Bush's right to access newly discovered evidence by conveniently scheduling his execution just a few weeks prior to Mr. Cave's resentencing which had been set by court order issued on May 1, 1996. The State is clearly responsible for any delay in procuring a valid sentence in Mr. Cave's case. The State, not Mr. Bush, failed to provide Mr. Cave with effective assistance of counsel at his first penalty phase. The State, not Mr. Bush, failed to provide Mr. Cave with a neutral and detached judge at his second resentencing. But for the interference of the State, Mr. Cave would have a valid sentence and Mr. Bush would know

prior to his execution whether or not his sentence is constitutionally proportional. Through no fault of his own, Mr. Bush may be executed only weeks before a more culpable codefendant receives a life sentence that would have made his death sentence unconstitutional. Such a result offends basic notions of due process and fairness. This Court must stay these proceedings until after Mr. Cave is sentenced. Equally culpable codefendants cannot be treated differently. Scott v. Dugger.

Any prior proportionality review of Mr. Bush's death sentence is no longer valid because Mr. Cave's death sentence has been vacated without reinstatement. A vacated death sentence of a more culpable codefendant cannot support a finding that Mr. Bush's sentence is proportional. This issue cannot be resolved until Mr. Cave's resentencing has occurred, the evidence has been presented, and a sentence imposed.

Mr. Bush and his three codefendants, Terry Wayne Johnson, Alphonso Cave, and J.B. Parker, were jointly indicted with one count each for first degree murder, kidnapping, and robbery with a firearm. Mr. Bush and his codefendants were tried, convicted, and sentenced separately in the following chronological order: Bush, Cave, Parker, and Johnson. Each were convicted of first-degree murder, kidnapping, and robbery with a firearm as charged by the indictment. Messers. Bush, Cave, and Parker were each sentenced to death, while Mr. Johnson received a life sentence.

The convictions and death sentences of Bush, Cave, and Parker were affirmed by this Court. Bush v. State, 461 So. 2d 936 (Fla. 1984); Cave v. State, 476 So. 2d 180 (1985); Parker v. State, 476 So. 2d 134 (1985). Mr. Johnson's conviction and life sentence was

affirmed by the Fourth Circuit District Court of Appeals.[3] Johnson v. State, 484 So. 2d 1347 (4th DCA 1986), review denied, 494 So. 2d 1151 (Fla. 1986). The following table illustrates the chronological history of Mr. Bush's and his codefendant's cases through direct appeal:

Defendant	Trial	Guilt Phase Verdict	Penalty Phase	Sentenced	Direct Appeal
John Earl Bush	11/15-19/82	11/19/82	11/22/82	death 11/22/82	11/29/84
Alphonso Cave	12/7-9/82	12/9/82	12/10/82	death 12/10/82	8/30/95
J.B. Parker	1/3-7/83	1/7/83	1/10-11/83	death 1/11/83	8/22/85
Terry W. Johnson	4/4-8/83	4/8/83	none	life 7/5/83	3/12/86 4DCA 8/29/86 FSC

This Court affirmed Mr. Bush's death sentence on November 29, 1984. Although Mr. Bush's direct appeal opinion does not expressly address whether his sentence was proportional, it must be assumed that this Court performed a proportionality review in this case. Tillman v. State, 591 So. 2d 167 (1991)(proportionality review required by Florida Constitution); Booker v. State, 441 So. 2d 148 (1983)(proportionality review presumed by Supreme Court review of death sentence on direct appeal).

It must also be assumed that this Court's proportionality review of Mr. Bush's death sentence included a comparison to his codefendant's sentences. Proportionality review requires a comparison to the sentences received by codefendants. Larzelere v. State, 676 So.

[3]After Mr. Johnson's conviction of first degree murder, his trial counsel filed a motion to preclude the death penalty under Enmund v. Florida, 102 S. Ct. 3368 (1982). The trial court granted the defense motion prior to penalty phase and sentenced Mr. Johnson to life imprisonment.

2d 394 (Fla. 1996); Armstong v. State, 642 So. 2d 730 (Fla. 1994); Hannon v. State, 638 So. 2d 39 (Fla. 1994); Colina v. State, 634 So. 2d 1077 (Fla. 1994); Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Steinhorst v. Singletary, 638 So. 2d 33 (1994); Downs v. State, 572 So. 2d 895 (1990); Herring v. State, 446 So. 2d 1049 (Fla. 1984).

This Court has explained the relevance of a codefendant's sentence to proportionality:

> When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. Downs v. State, 572 So. 2d 895 (Fla. 1990), *cert. denied*, 502 U.S. 829, 112 S. Ct. 101, 116 L.Ed.2d 72 (1991); Slater v. State, 316 So. 2d 539 (Fla. 1975). Thus, **an equally or more culpable codefendant's sentence is relevant to a proportionality analysis**. Cardona v. State, 641 Sao. 2d 361 (Fla. 1994), *cert. denied*,---U.S.---, 115 S. Ct. 1122, 120 L.Ed.2d 1085 (1995).

Larzelere v. State, 676 So. 2d 394, 406-407 (Fla. 1996)(emphasis added).

This Court has repeatedly stated that the actual triggerman is more culpable than other codefendants. Hannon v. State, 638 So. 2d 39 (Fla. 1994)(defendant more culpable because he delivered the fatal blow); Armstong v. State, 642 So. 2d 730 (Fla. 1994)(defendant triggerman more culpable than codefendants); Colina v. State 634 So. 2d 1077 (Fla. 1994)(where record established that life sentenced codefendant only knocked one of victims to the ground, defendant was more culpable because he delivered the fatal blows); Cook v. State, 581 So. 2d 1411 (Fla. 1991)(defendant triggerman more culpable), cert. denied, 112 S. Ct. 252 (1991); Downs v. State, 575 So. 2d 895 (Fla. 1990)(defendant triggerman more culpable).

At the time this Court performed its proportionality review in Mr. Bush's case, all of Mr. Bush's codefendants had been sentenced. Codefendants Alphonso Cave and J. B. Parker, one of whom the state has alternatively maintained was the actual triggerman and therefore more culpable than Mr. Bush, each received death sentences. This Court's proportionality review, therefore, was predicated upon the fact that more culpable codefendants received death. Since Mr. Bush's proportionality review in 1984, Mr. Cave's death sentence was vacated and he was remanded for resentencing in 1992 by the United States Court of Appeals for the Eleventh Circuit. Cave v. Singletary, 971 F. 2d 1513 (11th Cir. 1992)(finding penalty phase ineffective assistance of counsel). Following reimposition of his death sentence at resentencing, Mr. Cave's death sentence was once again vacated and remanded for a new penalty phase before a jury. Cave v. State, 660 So. 2d 705 (Fla. September 21, 1995)(new penalty phase required because trial judge failed to properly recuse himself upon a legally sufficient defense motion).

Currently, Mr. Cave is awaiting a jury resentencing scheduled for November 12, 1996. Mr. Cave may receive a life sentence as a result of his resentencing. If Mr. Cave were to receive a life sentence, Mr. Bush would also be entitled to an automatic life sentence because Mr. Cave is more culpable than Mr. Bush or at least as culpable as Mr. Bush. Scott v. Dugger, 604 So. 2d 465 (1992).

C. PROPORTIONALITY REVIEW IS CONSTITUTIONALLY REQUIRED

As a matter of Florida Constitutional law, Mr. Bush is entitled to an accurate proportionality review. Tillman v. State, 591 So. 2d 167 (Fla. 1991). Yet, at this time it cannot be determined whether or not Mr. Bush's sentence is proportional to that of his more

culpable codefendants. Mr. Cave is without a sentence. Mr. Cave's prior death sentences were vacated and are therefore legally irrelevant to a determination today of whether Mr. Bush's sentence is proportional. The proportionality review presumptively performed by this Court in this case on direct appeal is no longer valid. This Court relied upon Alphonso Cave's death sentence which has since been vacated. As a result, this Court considered materially inaccurate information in performing its proportionality calculus. This situation is similar to a sentencer considering and relying upon a prior violent felony aggravating circumstance to impose death, and that prior violent felony is then vacated in a separate proceeding. Even though the prior is vacated after the death sentence, Eighth Amendment error relates back to the imposition of the death sentence because the sentencer relied upon information which was later proven to be inaccurate. See Johnson v. Mississippi, 486 U.S. 578 (1988); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993). Similarly, the Court's reliance upon Alphonso Cave's death sentence invalidates Mr. Bush's proportionality review. Proportionality review is a critically important part of Florida's death penalty scheme.

Since Furman v. Georgia, 408 U.S. 238, 310 (Stewart, J. concurring) and 313 (White, J. concurring)(1973), the United States Supreme Court has required states that permit capital punishment to institute procedures that would protect against the "wanton" and "freakish" imposition of the death penalty and would provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." While overturning a Florida death sentence on what amounted to proportionality grounds, the United States Supreme Court wrote:

> If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty

> in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. Spaziano v. Florida, 468 U.S. 447, 460 (1984). The Constitution prohibits the arbitrary or irrational imposition of the death penalty. Id., at 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, e.g., Clemons, supra, at ___(citing cases); Gregg v. Georgia, 428 U.S. 153 (1976).

Parker v. Dugger, 111 S. Ct. 731, 739 (1991).

The United States Supreme Court upheld Florida's death penalty scheme in part because:

> [T]he Florida statute[4] has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases...In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. (citing cases, omitted). By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia Statute.

Proffitt v. Florida, 96 S. Ct. 2960, 2969 (1976).

This Court upheld Florida's death penalty scheme in part because the Court's automatic review provides an essential "concrete safeguard beyond those of the trial system to protect [defendants] from death where a less harsh punishment might be sufficient." State v. Dixon, 283 So. 2d 1 (Fla. 1973).

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[4] § 921.141(4), Fla. Stat., (1990), provides: "The judgement of conviction and sentence of death shall be subject automatic review by the Supreme Court of Florida..."

As a matter of Florida constitutional law, this Court reviews all death sentences to ensure relative proportionality among death sentences. Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). This review includes a comparison of "the case under review with all past cases to determine whether or not the punishment is too great." Id. citing Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert denied, 416 U.S. 943 (1974).

Constitutional proportionality mandates similar sentences for equally culpable codefendants. Larzelere v. State, 676 So. 2d 394 (Fla. 1996); Armstong v. State, 642 So. 2d 730 (Fla. 1994); Hannon v. State, 638 So. 2d 39 (Fla. 1994); Colina v. State, 634 So. 2d 1077 (Fla. 1994); Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Steinhorst v. Singletary, 638 So. 2d 33 (1994); Downs v. State, 572 So. 2d 895 (1990); Herring v. State, 446 So. 2d 1049 (Fla. 1984). To be constitutional, a death sentence must be proportionate when considered in totality of circumstances and compared with other capital cases. Sinclar v. State, 657 So. 2d 1138 (1995).

This Court has clearly rooted proportionality review in the Florida Constitution:

> We have described the "proportionality review" conducted by this Court in every death case as follows:
>
> > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of circumstances in a case, and to compare it with other capital cases.* It is not a comparison between the number of aggravating and mitigating circumstances.
>
> Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)(citation omitted)(emphasis added), *cert. denied.*, --- U.S.---, 111 S.Ct.

> 1024, 112 L.Ed.2d 1106 (1991). *Accord* Hudson [v. State], 538 So. 2d [829], 831 (Fla. 1989); Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. [footnote omitted]. It clearly is 'unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.

Tillman v. State, 591 So. 2d 167 (Fla. 1991).

Where this Court has found death to be comparatively inappropriate, it "ha[s] reduced the sentence to life imprisonment." Malloy v. State 382 So.2d 1190 (Fla. 1979); Burch v. State, 343 So. 2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).[5] Moreover,

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[5] The Florida Supreme Court has reduced a death sentence to life imprisonment based on its proportionality review in the following cases: Sinclair v. State, 657 So. 2d 622 (Fla. 1995); Besarba v. State, 656 So. 2d 441 (Fla. 1995); Chaky v. State, 651 So. 2d 1169 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Santos v. State, 629 So. 2d 838 (1994); Knowles v. State, 632 So. 2d 62 (Fla. 1993); Cannady v. State, 620 So.2d 165 (Fla. 1993); Kramer v. State, 619 So.2d 274 (Fla. 1993); Deangelo v. State, 616 So.2d 440 (Fla. 1993); White v. State, 616 So.2d 21 (Fla. 1993); Clark v. State, 609 So.2d 513 (Fla. 1992); Tillman v. State, 591 So.2d 167 (Fla. 1991); Klokoc v. State, 589 So.2d 219 (1991); McKinney v. State, 579 So.2d 80 (1991); Jackson v. State, 575 So.2d 181 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla. 1991); Penn v. State, 574 So.2d 1079 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Songer v. State, 544 So.2d 1010 (Fla. 1989); Banda v. State, 536 So.2d 221 (Fla. 1988); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Lloyd v. State, 524 So.2d 396 (Fla. 1988); Livingston v. State, 565 So.2d 1288 (Fla. 1988); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Fead v. State, 512 So.2d 176 (Fla. 1987); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Ross v. State, 474 So.2d 1170 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Menendez v. State, 419 So.2d 312 (Fla. 1982); Blair v. State, 406 So.2d 1103 (Fla. 1981).

proportionality review assures a measured and consistent application of the death penalty. State v. Dixon, 238 So.2d 1,7 (Fla. 1973). As this Court has stated:

> In Tillman v. State, 591 So.2d 167 (Fla. 1991) we explained that the purpose of the doctrine of proportionality is to prevent the imposition of "unusual" punishment contrary to Article I, section 17, of the Florida Constitution *** As explained in Tillman v. State, at 169, the death penalty is rendered "unusual" in a constitutional sense if it is imposed for a murder "similar to those cases in which death previously was deemed improper."

Kramer v. State, 619 So.2d 274 (Fla. 1993).

It would be "unusual" in violation of the Florida Constitution to execute Mr. Bush if his more culpable codefendant receives a life sentence. Scott. It is unknown at this time whether Mr. Bush's death sentence is proportional. This Court can no longer rely upon Mr. Cave's vacated death sentence to perform the constitutionally required proportionality review. Yet, Mr. Bush is entitled to a finding that his death sentence is proportional under the Florida Constitution prior to his execution. This Court's presumptive proportionality review was invalidated when Mr. Cave's death sentence was vacated. Until Mr. Cave is resentenced, there is no evidence to support a finding that Mr. Bush's death sentence is proportional. Such a finding is required by the Florida Constitution. Tillman.

D. THE LOWER COURT ERRED IN DENYING RELIEF

The lower court denied this claim on the merits, ruling that no caselaw holds that the trial court should do another proportionality review. This ruling is contrary to Scott v. Dugger. In Scott, this Court held that a codefendant's life sentence provided a basis for a defendant to challenge the proportionality of his death sentence in a Rule 3.850 motion. Mr.

Bush's claim was presented to the lower court in a Rule 3.850 motion. Under Scott, the lower court was required to address Mr. Bush's properly presented claim.

E. CONCLUSION

Mr. Bush cannot be forced to suffer the most severe punishment--death by electrocution--where the proportionality of his death sentence remains unresolved. This Court must enter a stay of execution until such time as the proportionality of Mr. Bush's sentence can be ascertained. Anything less would deny Mr. Bush the proportionality review guaranteed to every death sentenced individual in Florida. Such disparate treatment would not only violate the Florida Constitution, but would deny Mr. Bush due process and equal protection of the law in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT II

THE AGGRAVATOR COLD, CALCULATED AND PREMEDITATED WAS APPLIED IN MR. BUSH'S CASE IN AN UNCONSTITUTIONAL AND OVERBROAD MANNER.

Mr. Bush's sentencing jury was only informed of the statutory language of the aggravating circumstance--that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (R. 1288). The statutory language without adequate narrowing construction was and is unconstitutionally vague. Jackson v. State, 648 So. 2d 85 (Fla. 1994).

This claim is timely filed pursuant to Fla. R. Crim. P. 3.850. Under Fla. R. Crim. P. 3.850(b), Mr. Bush is permitted to file a new motion for post-conviction within two years

from the date of a decision announcing a new rule if "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." Adams v. State, 543 So. 2d 1244 (Fla. 1989)(post-conviction motions filed after June 30, 1989, and based on significant changes in the law must be made within two years from date decision was rendered). Jackson established that error had occurred in Mr. Bush's trial when this Court denied rehearing in Jackson on October 13, 1994 and the Jackson opinion became final. See Jackson, 648 So. 2d at 94 (Justice Overton wrote that the majority opinion rendered cases in which "cold, calculated and premeditated" had been relied on "subject to attack in a motion under rule 3.850"). It is a well settled principle of appellate law that a decision is not final until the time expires for a motion for rehearing, or if a rehearing motion is filed, until that motion is disposed of. See Caldwell v. State, 232 So.2d 427 (Fla. 1st DCA 1970). Until a motion for rehearing is decided, the appellate court is free to modify or otherwise withdraw its opinion. In fact, the slip opinion in Jackson contained the standard language that the opinion was not final until a motion for rehearing was denied. Thus, Mr. Bush's Jackson claim is timely filed.

In Jackson, this Court recently held that the jury should be instructed on the limiting constructions on the statutory language of this aggravating circumstance, whenever they are allowed to consider it. The limitations required by this Court read as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan or

> prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Jackson, 648 So. 2d at 90. Mr. Bush's jury was instead given the vague statutory language of the cold, calculated and premeditated aggravating circumstance without an adequate narrowing construction. Mr. Bush's jury received the following instruction from the Court:

> And fourth, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification.

(R. 1288).

The United States Supreme Court has explained:

> In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the Godfrey and Maynard line of cases.

Stringer v. Black, 503 U.S. 222; 112 S. Ct. 1130, 1137 (1992)(emphasis added). In Richmond v. Lewis, 113 S. Ct. at 535, the Court explained: "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand."

Clearly, this Court on direct appeal did not cure the error. Bush v. State, 461 So. 2d 936 (Fla. 1984). This Court did not identify what the adequate narrowing construction is,

nor did it discuss the absence of the narrowing construction at Mr. Bush's trial, let alone "rely upon" it. Richmond, at 534.

The Court in Stringer clearly indicated that: "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. "[T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139. Accordingly, the Eighth Amendment requires the reviewing court to "determine what the sentencer would have done absent the factor." Stringer, 112 S. Ct. at 1137.

The failure to guide the jury's sentencing discretion was not cured. The oral sentencing "order" by the trial court reflects precisely this lack of specific guidance:

> Fourthly, the crime for which the Defendant is to be sentenced was committed in a cold calculated and premeditated manor [sic] without any pretense of moral or legal justification. Okay, certainly there was no pretense of moral or legal justification in this killing from the evidence that we have. The question is whether it was committed in a cold, calculated and premeditated manor [sic] and that is another problem both to jurors and judges. I know when we were discussing the instructions to the jury there was some question about them overlapping. Obviously the legislature would not have established these two separate categories if they thought they overlapped. The question of premeditation of course was present in the murder charge and of course the rule is it doesn't have to exist for any especially long period of time. The question of calculation, well, the evidence again shows there was some discussion of this while she was being transported in the car. Of course, you may maintained you did not take part in that, but that is something the jury found against you on. It certainly was cold in the sense that this girl's life was simply wasted without any

> reason whatsoever. So the court will find that that aggravating circumstances has been met.

(R. 1363-1364). The court relied in his oral sentencing "order" affirming the jury's finding of the CCP aggravator on a representation that the jury must, necessarily, have found premeditation on Bush's part during the guilt phase. This Court has said that where an aggravator merely repeats an element of the crime of first degree murder that the aggravator is facially vague and overbroad. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Mr. Bush was convicted of first degree murder. The prosecutor had argued guilt on the basis of both felony murder and premeditation. No specific finding of the basis of the first degree murder conviction was made. The finding of "calculation" was based only on a vague reference to alleged discussions in the car between the place of abduction and the location where Fran Slater's body was discovered. Coldness was found based solely on the objective fact of the murder. The judge did not apply an adequate narrowing construction of "cold, calculated and premeditated."

Without an adequate narrowing construction, the statute upon which the sentencer relied in Mr. Bush's case is similarly vague and unconstitutional. Jackson v. State. The failure of the sentencers to actually apply an adequate narrowing construction violated the United States Supreme Court decision in Richmond v. Lewis, 113 S. Ct. 528 (1992), and the Eighth and Fourteenth Amendments to the United States Constitution. Richmond requires trial juries and judges to apply adequate limiting constructions, yet neither Mr. Bush's sentencing jury nor his sentencing judge applied the aforementioned limitations. Mr. Bush's judge and jury were inadequately guided and channelled in their sentencing discretion. As in

Richmond, the constitutionally narrowed statutory language was never incorporated into the sentencing calculus.

Mr. Bush properly preserved this issue for review at trial and on direct appeal. Trial counsel for Mr. Bush specifically moved that the CCP aggravating factor be precluded from consideration by both the Court and the jury during the sentencing phase. As the motion submitted by counsel argued:

> 2. The wording of subsection (i)[6] is so vague, ambiguous and indefinite as to deprive the Defendant of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16, of the Florida Constitution. There are no definitions for the terms of the Sections. Neither are there any Florida cases which define what the Section means. Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by the jury in arriving at a decision.
>
> 3. Penal statutes must be definite to be valid. Locklin vs. Pridgeon, 330 So. 2d 102 (Fla. 1977). In attack on statutes, constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte vs. Anderson, 349 So. 2d 164 (Fla. 1977).
>
> 4. The Florida Legislature, by enacting this Section, made all "premeditated murders" death penalty cases unless the Defendant was able to prove some mitigating circumstances. Such action is unconstitutional under both the Federal and State Constitutions. In effect, all "premeditated murder" cases would be mandatory death sentences unless the Defendant could prove a mitigating circumstance. Mandatory death sentences have been held unconstitutional in the United States Constitution and Woodson vs. North Carolina, 428 U.S. 280 (1976), Roberts vs. Louisiana, 431 U.S. 633 (1977). Further, should Subsection (i)

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[6]Section 921.141(5)(i), FLA. STAT. then provided "[t]he capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

be considered, then it would reverse the presumption of innocence and create a presumptive death sentence and shift the burden of proof to the defendant to show that he is entitled to a life sentence in violation of the United States and Florida Constitutions and the United States Supreme Court decision in Sandstrom vs. Montana, 99 S. Ct. 2450 (1979).

5. Said Subsection (i) creates a presumptive death statute in a case where the State is pursuing the theory of premeditated murder.

6. Said presumptive death statute is unconstitutional under the United States and Florida Constitutions as it creates arbitrary and capricious imposition of the death penalty and effectuates cruel and unusual punishment violative of both the Florida and the united States Constitutions.

WHEREFORE, counsel for the Defendant, John Earl Bush, moves this Court to enter an Order declaring Section 921.141(5)(i), FLA. STAT., to be unconstitutional or, in the alternative, to preclude this Court and jury from considering the circumstances as an aggravating circumstances in the above-styled case.

(R. 1489-1490).

Mr. Bush objected to the statutory language of the cold, calculated, and premeditated aggravating factor on the grounds of vagueness. Argument on the motion he filed was held on June 30, 1982 before the Honorable C. Pfeiffer Trowbridge, along with counsel for Bush's three codefendants. Bush's counsel, Lee Muschott, advised the Court that he had eight motions that were "similar and identical" to the motions Mr. Frierson, counsel for Terry Wayne Johnson, had filed in behalf of his client. Mushott advised that court that Mr. Frierson would argue these motions. (R. 1071).

The argument by Frierson relied on by Mr. Bush was as follows:

> Judge, my next motion, this is a motion to declare Sections 921.141 (5) (i) Florida Statute unconstitutional and preclude the Court's instruction on the section during the penalty proceedings. This particular section, Your Honor, Five Eye is a particular aggravating circumstance that was added later on and states that if a capital felony was committed in a cold, calculated and premeditated manner, that any pretense of moral or legal justification. Our grounds are, basically, that by enacting this particular aggravating circumstance, the Florida legislature has made all premeditated murders death penalty cases, making the Florida premedidtated murder statute a presumptive death statute. We are also arguing that the wording of the aggravating circumstance is too vague to withstand constitutional scrutiny and based on those two arguments, we'd ask the Court hold that particular aggravated circumstance unconstitutional.

(R. 1086).

At the conclusion of the hearing, Muschott asked that the Court rule on his identical motion relying on the argument by Frierson, specifically including Muschott's motion "Number Three, a motion to declare 921.141 (5) (i) unconstitutional." (R. 1114). The Court responded, "I'll rule then on those motions the same as I did as to the other defendants..." (R. 1115).

Mr. Bush argued in point seven of his direct appeal that the CCP statutory language was unconstitutionally vague. Mr. Bush's direct appeal stated:

> The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See, Godfrey v. Georgia, 446 U.S. 420 (1980).

Bush's Direct Appeal Brief at 37. In response to this argument, this Court wrote:

> In point seven Bush raises a variety of objections relative to the constitutionality of the Florida capital sentencing statute. Each of his contentions has been previously addressed and we do not deem it necessary to review them See e.g., Proffitt v.

> Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 2966, 49 L.Ed.2d 913 (1976).

Bush v. State, 461 So. 2d 936, 941 (Fla. 1984). There can be no question but that Mr. Bush's vagueness challenge to the cold, calculated, and premeditated aggravator was denied on the merits, not on procedural grounds, by this Court.

Mr. Bush's 1990 state habeas also asserted a specific vagueness claim concerning the cold, calculated, and premeditated statutory language given to his jury during penalty phase. Mr. Bush's state habeas asserted:

> An overbroad application of the cold, calculated and premeditated aggravating circumstance occurred in Mr. Bush's case. Under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the overbroad application of an aggravating circumstance violates the eighth amendment. As the record in its totality reflects, the sentencing jury, sentencing court and this Court on direct appeal never applied a limiting construction to the cold, calculated aggravating circumstance as required by Cartwright.
>
> Aggravating circumstance (5)(i) [CCP] of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and is in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution...
>
> In Mr. Bush's case, however, the jury was told nothing about what is required to establish this aggravating circumstance. In fact, the prosecutor told the jury no more than simple premeditation was required...
> Here, the error goes beyond the failure to apply a limiting construction: the jury was expressly told that simple premeditation (the very same thing needed to convict) was all that was required in order to find this aggravator.
>
> Because Mr. Bush was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge applied a narrowing construction to this aggravator, Mr. Bush's sentence violates the eighth and fourteenth amendments.

Bush's State Habeas filed September 4, 1990 at pp. 40-46.

This Court denied this vague statutory language claim in his state habeas as "procedurally barred because Bush raised the claim on direct appeal." Bush v. Dugger, 579 So. 2d 725 (Fla. 1991). Mr. Bush notes once again, that this Court rejected this claim on direct appeal on the merits, not on a procedural bar. Further, Mr. Bush notes that this Court's 1990 state habeas decision was issued four (4) years prior to Jackson.

The cold, calculated, and premeditated aggravating factor was overbroadly applied and failed to genuinely narrow the class of persons eligible for the death sentence. No sentencing calculus has been conducted free of the taint of Eighth Amendment error. Richmond v. Lewis, 113 S. Ct. 528 (1992). As a result, Mr. Bush's death sentence stands in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Finally, because Mr. Bush's jury only recommended death by the narrow margin of 7 to 5, this error cannot be considered harmless beyond a reasonable doubt. Chapman v. California 386 U.S. 18 (1967)(state must prove constitutional error beyond a reasonable doubt); Duest v. Singletary, 967 F.2d 462 (11th Cir. 1992)(consideration of invalid aggravating circumstance not harmless error where jury recommended death by 7 to 5 vote).

This Court was placed on notice by its own opinion in Jackson. In an opinion dissenting from the grounds of the majority's holding that the standard CCP instruction is constitutionally invalid but concurring with the resulting new penalty phase for Jackson on other grounds, Justice Overton opined:

> By this decision the majority has made the penalty phase of every death case in which the standard jury instruction on the cold, calculated, and premeditated aggravating factor was given

> subject to attack in a motion under rule 3.850, Florida Rules of Criminal procedure.

Jackson, 648 So. 2d at 94. Mr. Bush's 3.850 motion was timely filed relying on Jackson. There has never been a narrowing instruction applied to the CCP factor relied on by the jury and the court at his 1982 trial. Relief is warranted.

ARGUMENT III

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. BUSH'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In the lower court, Mr. Bush sought public records disclosure pursuant to Fla. Stat. Ch. 119. Roberts v. State, 21 Fla. L. Weekly S245 (Fla. June 6, 1996). See Ventura v. State, 21 Fla. L. Weekly S15 (Fla. Jan 11, 1996); Roberts v. Dugger, 623 So. 2d 481 (Fla. 1993); Walton v. Dugger 621 So.2d 1357 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), and Fla. R. Civ. P. 1.350.

To date, Mr. Bush continues to receive only partial records compliance from the Martin County Sheriff's Office and Martin County State Attorney's Office. This has occurred despite assertions by Robert Crowder, the Sheriff of Martin County, and Suzanne WP, records specialist for the Martin County Sheriff's Department that all public records have been received by Mr. Bush. The trial court determined that the Martin County Sheriff's Department had complied with all public records requests and entered an order to

that effect on October 7, 1996. No sooner than that order had been entered than the Martin County Sheriff's Department belied the Court's conclusions by producing new public records. Clearly the Court's order was incorrect. On October 14, 1996, the Court refused to hold any further hearings regarding public records; finding that although the sheriff's office produced new public records after the court had found it had produced all records, there was no reason to reconsider its patently erroneous prior decision.

One compelling example of non-compliance is a phone call received by CCR investigator Terry Farley Walsh on October 9, 1996, indicating that she had spoken to three Martin County Sheriff's Department Officers who indicated that they may possess files and personal notes in their garage at home relating to their investigation of Mr. Bush's case. To date, only the personal notes of Sheriff Crowder himself have been provided to Mr. Bush, and they were provided only on October 10, 1996. Additionally, the Martin County Sheriff's Office failed to provide Mr. Bush with copies of all polygraph charts prepared as the result of polygraph examinations of Mr. Bush and his codefendants until Saturday, October 12, 1996. The polygraph information relating to codefendant Terry Wayne Johnson has not been provided by the Sheriff because it was apparently initiated by counsel for Johnson at the Public Defender office. However, the Public Defender's polygrapher who administered Johnson's polygraph examination was simultaneously reviewing and overseeing the work of the police polygrapher intern Detective Vaughn who examined Mr. Bush and Mr. Parker. Likewise, the Office of the State Attorney has failed to turn over files and has improperly asserted exemptions.

This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). Further, this Court has extended the time period for filing Rule 3.850 motions after disclosure of Chapter 119 materials. Muehleman; Provenzano; Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). In these cases, a period of sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials.

Mr. Bush requests that this Court review the trial court's in camera inspection of any and all public records for which exemptions have been claimed, so as to determine if any Brady material has been concealed. See Ventura; Roberts; and Walton. Mr. Bush should likewise be given an extension of time and allowed to amend once the requested records have been fully disclosed. Mr. Bush is entitled to a stay of execution and an evidentiary hearing on this issue. Roberts v. State.

ARGUMENT IV

MR. BUSH'S SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude," such as prior

uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear that the rule of Tucker applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord Douglas v. Wainwright, 714 F.2d 1532, 1551 n.30 (11th Cir. 1983).

In Mr. Bush's case, materially inaccurate information was presented to and relied upon by the judge and jury who sentenced him to death. Johnson v. Mississippi, 486 U.S. 578 (1988). See also Smith v. Murray, 477 U.S. 527 (1986) (sentence of death constitutionally unreliable when misleading or inaccurate information is presented to the jury); Maggard v. State, 399 So. 2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981). The fundamental error which occurred at Mr. Bush's capital proceedings and which resulted in his death sentence must now be evaluated.

At Mr. Bush's capital sentencing, the State presented evidence to his sentencing jury and judge that Mr. Bush had been convicted of the crimes of robbery and sexual battery on July 22, 1974. (R. 1141-1142). Based upon this evidence, the trial court found that the prior crime of violence aggravating factor had been established. (R. 1301)).

The convictions upon which the sentencing jury and judge relied were unconstitutionally obtained and invalid.

Informations were filed in St. Lucie County, Florida, on April 4, 1974, in Case Nos. 74-131-A and 74-131-B, charging fifteen year old John Earl Bush and fourteen year old codefendant Lueagie R. Phillips each with one count of rape and one count of robbery.

Assistant Public Defender N. Richard Schopp was then appointed to represent both Mr. Bush and Mr. Phillips.

Mr. Schopp did not notify the Court and did not move to withdraw from the representation of either Phillips or Bush. The record makes clear that counsel was aware of this conflict, as he filed a motion to sever Mr. Phillips' trial on the grounds that his client, Mr. Bush, had made statements incriminating his other client, Mr. Phillips. See also Mr. Schopp's statements to the Court regarding these statements (R2. 167). However, this motion was not filed in a timely fashion as it was filed on the day of trial, June 3, 1974. The motion was denied and a jury trial commenced on that day.

During trial, counsel for the State sought to call Gerald Devane, an officer with the Fort Pierce Police Department to testify regarding the statements made by Mr. Bush. The State proffered Mr. Devane's testimony for the purposes of determining admissibility. During the proffer Mr. Schopp asked the following questions:

CROSS EXAMINATION

BY MR. SCHOPP:

Q. May it please the Court. Lieutenant DeVane, when you asked John Bush to sign the waiver of rights' form did you tell him at that time that he did not have to sign that form?

A. No.

Q. You did not?

A. No.

Q. Do you recall in the general run of the statement given to you by John Bush, isn't it true that most of the time he

was referring to Tony Knight and Lueagie Phillips throughout the statement rather than his own actions, most of the time?

A. Would you ask that again, now?

Q. Throughout most of the statement wasn't he referring to Tony Knight and Lueagie Phillips?

A. Yes.

Q. Doesn't he state that Tony Knight through of taking the -- in his statement didn't he state that Tony Knight thought of taking the wire of the automobile at first --

(R2. 166).

The Court then cautioned Mr. Schopp that the State had not asked Mr. Devane about Mr. Bush's statements placing the blame for the alleged offense on Mr. Schopp's other client, Mr. Phillips, and another codefendant, Mr. Knight. Mr. Schopp provided the following explanation for his line of questioning.

Mr. SCHOPP: Yes, sir. If it please the Court, for clarification, for purposes of asking some of these questions, not only have we filed our motion to dismiss, but in our motion for severance is that the statement would be in admissible as to whether it was made voluntarily or not. There is case law to the effect that a statement of a codefendant, cannot be admitted whether it is voluntary or not, because it denies the defendant the right to cross examination. The Leading case is Bouton vs. United States (sic), and that has been upheld in two cases in the State of Florida. That is why, that is the purposes of my questioning.

(R2. 167).

The Court then advised Mr. Schopp that if he were to open that door, the State would be entitled to introduce Mr. Bush's statements against Mr. Phillips (R2. 167-168). Mr. Devane was called to the witness stand and was examined by counsel for the State.

Mr. Schopp then conducted his cross examination. During that cross-examination, Mr. Schopp did not ask Mr. Devane any of the questions which, during proffer, had resulted in answers placing the blame for the alleged offense on Mr. Schopp's other client, Mr. Phillips.

Mr. Bush and Phillips were found guilty of robbery and rape. Mr. Schopp filed a Notice of Appeal for both of his clients on July 4, 1974. On October 25, 1974, he filed a motion on behalf of Mr. Phillips to consolidate the appeals of his two clients.

Craig Barnard, then a legal intern with the Office of the Public Defender of the 15th Judicial Circuit, and Elliot R. Brooks, the Chief of the Appellate Division of that office, as counsel for both John Bush and Lueagie Phillips filed an initial brief on April 24, 1975. That brief raised two issues: the propriety of transferring his clients from juvenile court to adult court without a hearing and whether client Phillips had been denied his right to confrontation by Mr. Devane's testimony. Mr. Barnard, who was by that time an Assistant Public Defender, filed an answer brief on behalf of both clients on July 2, 1975. At no point in the record did John Earl Bush waive his right to be represented by effective, non-conflicted counsel.

The Florida District Court of Appeals for the Fourth District affirmed the circuit court judgment and sentence. John Bush and Lueagie Phillips v. State of Florida, 320 So.2d 504 (4DCA Fla. 1975) Case Nos. 74-1014, 74-1015 (Per Curiam Opinion of October 3, 1975).

At all times during the direct appeal of John Bush and Lueagie Phillips,[7] Mr. Bush and Mr. Phillips were represented by the same appellate counsel, Mr. Elliot R. Brooks and Mr. Craig Barnard.[8] Further, at all times during their joint trial, Mr. Bush and Mr. Phillips were represented by the same trial attorney, Mr. N. Richard Schopp. The record reflects that on no occasion did Mr. Bush waive this clear conflict of interest or consent to either appellate or trial counsel's simultaneous representation of both himself and Mr. Phillips.

Appellate counsel, who was himself engaged in the dual representation of the petitioner and Mr. Phillips, failed to challenge the constitutionality of John Bush's conviction and sentence based upon the conflict of interest arising from Mr. Schopp's dual representation of these two men during their joint trial. His failure to do so deprived Mr. Bush of constitutionally adequate direct appellate counsel under both conflict of interest and ineffective assistance of counsel analyses. Mr. Bush was clearly entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Had Mr. Bush been provided with the counsel guaranteed him by the Constitutions of the United States and the State of Florida he would have been afforded a new trial on direct appeal.

The record makes clear that appellate counsel chose to promote Mr. Phillips' interests over those of Mr. Bush. The adverse affect that resulted from the conflict in this case was not implied or derivative but direct. One of the two issues briefed by counsel was that "[t]he

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[7]Mr. Bush's and Mr. Phillips' cases had been joined for the purposes of appeal at the request of Mr. Phillips.

[8]At the time Mr. Phillips's and Mr. Bush's joint initial brief was filed, Mr. Brooks was counsel of record and Mr. Barnard appeared as a certified legal intern. By the time their joint reply brief was filed, Mr. Barnard had been admitted to the Florida Bar and appeared as counsel of record.

Trial Court Erred As To Appellant Lueagie Phillips In Admitting Testimony Concerning a Statement of his Co-Appellant Which Implicated Appellant Phillips and Thereby Denied Him His Sixth Amendment Right to Confrontation."[9] Brief of Appellants to the Fourth District Court of Appeal of April 24, 1975 at page 31. What appellate counsel failed to raise, however, was a claim on behalf of Mr. Bush that not only did the court properly admit portions of Mr. Bush's statement tending to show that persons other than Mr. Bush were the culpable participants in the alleged offense, but that Mr. Schopp failed to introduce the portions of Mr. Bush's statements casting the blame on Mr. Phillips and Mr. Knight. These statements were elicited when Mr. Devane's testimony was proffered. Unfortunately for Mr. Bush, by making the decision to raise the claim on Mr. Phillips' behalf, appellate counsel necessarily took a position contrary to Mr. Bush. Counsel's inability to promote Mr. Bush's interests on appeal because of the decision he had made to boost Mr. Phillips' case adversely affected Mr. Bush's case and relief is warranted.

The conflict of interest created by a lawyer's dual representation of codefendants is a concept well-recognized in our system of justice. The United States Supreme Court has created several clear principles of law with respect to constitutional conflict of interest claims, set forth in Glasser v. United States, 315 U.S. 60 (1942), Holloway v. Arkansas, 435 U.S. 475 (1978), and Cuyler v. Sullivan, 466 U.S. 335 (1980). These opinions make

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[9]It should be noted that this issue was entirely specious. Even a cursory review of the record reveals that no evidence incriminating Mr. Phillips was presented to the jury. Some such evidence was elicited by Mr. Schopp in an attempt to buttress client Phillips' previously denied motion to sever during a proffer of the proposed testimony. Trial counsel, after being warned that such an inquiry would open the door for the State to introduce Mr. Bush's entire statement, which detailed the extensive involvement of client Phillips, did not repeat these questions before the jury.

clear that an attorney's simultaneous representation of conflicting interests results in counsel's "struggle to serve two masters," Glasser, 315 U.S. at 75, both of whom are owed a legal and ethical duty of undivided loyalty. Because "the duty of loyalty . . . [is] perhaps the most basic of counsel's duties," Strickland v. Washington, 466 U.S. 668, 692 (1984), such a "struggle" cannot be countenanced under the Sixth Amendment due to the fact that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691-92. The reliability of the proceedings is therefore premised upon legal representation free from conflicting loyalties.

Simultaneous representation of conflicting interests is an especially "suspect" practice because it is "difficult to judge intelligently the impact of a conflict on the attorney's representation of a client." Holloway, 435 U.S. at 489-90. The "evil" associated with simultaneously representing conflicting interests "is in what the advocate finds himself compelled to refrain from doing." Id. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Id.

When counsel breaches the duty of loyalty, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." Strickland, 466 U.S. at 692. However, "[w]hen the effects of a constitutional violation are not only unknown but unknowable, the Constitution demands that doubts be resolved in favor of a criminal defendant." Bonin v. California, 494 U.S. 1039 (1990) (Marshall and Brennan, JJ., dissenting from denial of petition for writ of certiorari). A defendant is deprived of the Sixth

Amendment right to counsel where (i) counsel faced an actual conflict of interest, and (ii) that conflict "'adversely affected'" counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)); LoConte v. Dugger, 847 F.2d 745, 754 (11th Cir.), cert. denied, 488 U.S. 958, 109 S. Ct. 397, 102 L. Ed. 2d 386 (1988); see also United States v. Khoury, 901 F.2d 948 (11th Cir.) (absent a knowing, voluntary waiver, defendant is entitled to representation free of actual conflict), modified on other grounds upon denial of rehearing, 910 F.2d 713 (11th Cir. 1990).

Where a conflict is present, as is clearly the case here, actions or inactions by trial counsel should be considered under the standard announced in United States v. Cronic, 466 U.S. 648 (1988), and discussed in Strickland:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n.25, 104 S.Ct., at 2046-2047, and n.25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 659, 104 S.Ct., at 2047.

Strickland, 466 U.S. 668 at 692.

Under this standard a per se presumption of prejudice applies. The presumption arises when there is actual or constructive denial of counsel or where counsel fails to subject the government's case to adversarial testing. Cronic, 466 U.S. at 659. "(T)he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967). The right to effective assistance of counsel is thus the right of the accused to require the prosecutor's case

to survive the crucible of meaningful adversarial testing. United States v. Cronic, 466 U.S. 648, 656 (1984).

The United States Supreme Court recognized:

> [i]n certain Sixth Amendment contexts, prejudice is presumed. . . . Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."

Strickland v. Washington, 466 U.S. 668, 692 (1984).

In Cronic the court states in certain cases a case-by-case inquiry into prejudice is not worth the cost. An adverse effect occurs when an attorney's actual conflict causes a lapse in representation contrary to the defendant's interest. See Stoia v. United States, 22 F.3d 766 (7th Cir. 1994).

This Court has embraced these principles and has expressly recognized that appellate counsel must be free from conflicts of interest. Barclay v. Wainwright, 444 So.2d 956 (1984). In Barclay, appellate counsel represented both appellant and his codefendant on appeal to this Court. As in this case, appellate counsel made the clear decision to promote the interests of the codefendant over those of appellant. As in this case, appellate counsel chose not to raise issues on appellant's behalf which would have benefitted appellant in order to assist the codefendant. As in this case, this decision is clearly ascertainable from the existing record of the proceedings.

In granting relief in Barclay, this Court stated:

> Conflict-of-interest cases usually arise at the trial level, but, being caused by one attorney representing two or more clients, can arise at any level of the judicial process. In general an attorney has an ethical obligation to avoid conflicts of interest and should advise the court when one arises. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333

> (1980). An actual conflict of interest that adversely affects a lawyer's performance violates the sixth amendment and cannot be harmless error. Id; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Foster v. State, 387 So.2d 344 (Fla. 1980). Counsel's allegiance to a client must remain unaffected by competing obligations to other clients, and an actual conflict of interest renders judicial proceedings fundamentally unfair. United States v. Alvarez, 480 F.2d 1251 (5th Cir. 1978). A conflict occurs "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975).

Barclay, 444 So.2d at 958. See also Larvelere v. State, 676 So. 2d 394 (Fla. 1996) (Holding that for valid a waiver of conflict-free counsel to occur, the record must show that the defendant was aware of the conflict of interest, that the defendant realized the conflict could affect the defense, and that the defendant knew of the right to obtain other counsel.)

The Florida Bar has set forth very clear guidelines for the situation in which a conflict of interest exists. Rule 4-1.7 of the Florida Rules of Professional Conduct states, in pertinent part:

> **(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
>
> (2) each client consents after consultation.
>
> **(b) Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The comments to Rule 4-1.7 emphasize that "loyalty is an essential element in the lawyer's relationship to a client," and that this loyalty is "impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." "The lawyer's own interests should not be permitted to have adverse effect on representation of a client," and "[a] lawyer may not allow related business interests to affect representation."

Here there is no doubt but that such a conflict of interest existed in the case at bar, as the interests of Petitioner and Mr. Phillips were diverse and irreconcilable. They were codefendants. Statements attributed to Petitioner and introduced into evidence placed the blame for the alleged offenses squarely on Mr. Phillips' and another codefendant's, Mr. Knight's, shoulders. The State did not introduce evidence of any other prior convictions. The evidence of the prior felony provided one of the three aggravating circumstances found to exist by the Court.

The underlying conviction upon which Mr. Bush's sentence of death rest was obtained in violation of Mr. Bush's rights under the Sixth and Fourteenth Amendments. His death sentence, founded upon that unconstitutionally obtained prior conviction, thus also violates

his constitutional rights. Johnson v. Mississippi, 486 U.S. 578 (1988); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993).

The presentation of the unconstitutionally obtained prior conviction deprived Mr. Bush of a fair and reliable trial and capital sentencing determination. Rivera v. Dugger, 629 So. 2d 105 (Fla. 1994). This error cannot be harmless, as the jury's consideration of materially inaccurate information substantially influenced the jury's guilty verdict and death recommendation -- certainly, a grave doubt exists as to whether it did. Duest.

Mr. Bush is currently litigating the validity of his constitutionally infirm prior convictions. On September 27, 1996, Mr. Bush filed a petition for writ of habeas corpus in the District Court of Appeals for the Fourth Judicial District challenging his convictions of rape and robbery. He also filed an Emergency Application for Extraordinary Relief, Motion for Stay of Execution, Petition for Writ of Mandamus, and Petition for Writ of Prohibition, seeking to stay Mr. Bush's execution to permit consideration of Mr. Bush's indisputably meritorious petition for writ of habeas corpus. Both were denied the same day. On September 30, 1996, Mr. Bush petitioned this Court to issue a writ to the state court of appeals pursuant to this Court's all writs jurisdiction. Thereafter, Mr. Bush moved this Court to stay the warrant of execution pending in his 1984 murder case. On October 2, 1996, this Court denied Mr. Bush's petition. John Earl Bush v. State of Florida, Case No. 89,046 (Fla. October 2, 1996). On October 8, 1996, Mr. Bush filed a petition for Writ of Habeas Corpus with the United States District Court, Southern District. On that same date, Mr. Bush also filed a Petition for a Writ of certiorari and application for stay of execution

with the United States Supreme Court. The issues raised in these petitions have not yet been addressed.

Mr. Bush has pled facts which, if true, entitle him to relief from his 1974 conviction for robbery and sexual battery. Mr. Bush received ineffective assistance of trial and appellate counsel when they represented him despite a clear conflict of interest. Even as Mr. Bush is about to be executed by the State of Florida, there is substantial doubt that the prior conviction used to support one of the aggravating circumstances in Florida, is valid. Until this matter has been resolved in the federal courts, it must be assumed that the conviction is invalid. For this reason, this Court should order a stay of Mr. Bush's execution until the federal court has made a determination on the validity of his claim for relief.

CONCLUSION AND REQUEST FOR STAY OF EXECUTION

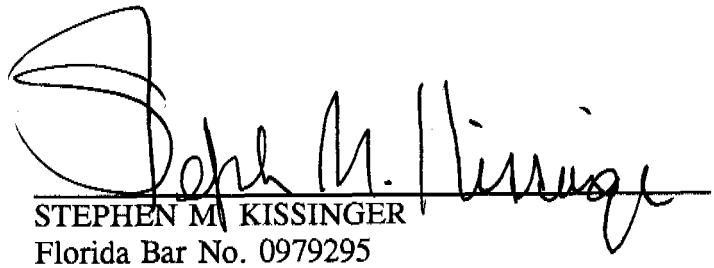
The standards attendant to the grant of a stay of execution and the grant of an evidentiary hearing are the same. A stay of execution is proper when the defendant presents "enough facts to show . . . that he might be entitled to relief under rule 3.850." State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). When the defendant presents such facts, a trial court has "a valid basis for exercising jurisdiction" and granting a stay of execution and an evidentiary hearing. Id.; see also State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986). If an evidentiary hearing is proper -- as is the case here -- then a stay of execution is proper as well. Both are proper here. Both should be granted here in order for the Court to fully, judiciously, and fairly hear the evidence.

A Rule 3.850 litigant is entitled to an evidentiary hearing (and a stay of execution) unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Roberts v. State, 21 Fla. L. Weekly S245 (Fla. June 6, 1996); Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Sireci, 502 So. 2d at 1224; Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). See also Groover v. State, 489 So. 2d 15 (Fla. 1986). Where, as here, a capital post-conviction litigant presents a well-pled claim, an evidentiary hearing is warranted. See Roberts v. State, 21 Fla. L. Weekly S245 (Fla. June 6, 1996); Scott v. State, 657 So. 2d 1129 (Fla. 1995); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Jones v. State, 591 So. 2d 911 (Fla. 1991).

In deciding whether to deny a Rule 3.850 motion without an evidentiary hearing and a stay of execution, the trial Court must first determine "whether the motion on its face conclusively shows that [the defendant] is entitled to no relief." See Roberts v. State, 21 Fla. L. Weekly S245 (Fla. June 1996; Scott v. State, 657 So. 2d 1129 (Fla. 1995); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Squires v. State, 513 So. 2d 138, 139 (Fla. 1987). Mr. Bush's motion, like those in Roberts; Scott; Johnson; and Jones pleads much more than sufficient facts to require an evidentiary hearing and a stay of execution. O'Callaghan; Lemon; Sireci.

Precedent is clear. Under Rule 3.850 and this Court's interpretations of that rule, Mr. Bush is entitled to an evidentiary hearing and to a stay of execution. Roberts.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by facsimile transmission and United States Mail, first class postage prepaid, to all counsel of record on October 15, 1996.



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